

**IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA**

SHANIQUE BAKER, individually and on
behalf of others similarly situated,

Plaintiffs,

v.

PUTATIVE CLASS ACTION
Case No. CACE-22-000741

CITIZENS PROPERTY INSURANCE
CORPORATION,

Defendant.

_____ /

DEFENDANT'S MOTION TO DISMISS COMPLAINT

Defendant, Citizens Property Insurance Corporation (“Citizens”), by and through its undersigned counsel and pursuant to Florida Rule of Civil Procedure 1.140(b), hereby moves to dismiss this declaratory judgment complaint based on its failure to state a cause of action and states in support thereof as follows:

I. Factual Allegations from the Complaint¹

On January 14, 2022, the proposed class representative filed this one-count action on behalf of a putative class, alleging that Citizens “refused to pay attorney fees based on a policy it instituted after the enactment of Fla. Stat. 627.70152.” Compl. ¶ 37. The Complaint seeks a declaratory judgment “that Florida Law requires [Citizens] to pay reasonable attorney fees during the pre-suit process mandated by 627.70152.” *Id.* at Wherefore Clause.

¹ Citizens has included the allegations from the Complaint in this motion merely because such allegations are taken as true in the context of a motion to dismiss. Citizens would note, however, that many of the Complaint’s allegations are factually incorrect.

According to the Complaint, the facts giving rise to this action occurred on May 8, 2021, when the proposed class representative, an insured of Citizens, suffered damage to her home. *Id.* ¶¶ 12–13. The proposed class representative then retained counsel “to assist with the prosecution of the claim,” *id.* ¶ 15, and her counsel “proceeded to investigate the claim and engage in the pre-suit process required by Fla. Stat. 627.70152.” *Id.* ¶ 16.

The Complaint alleges that after receiving the statutory notice, Citizens remitted payment on the claim but did not include attorneys’ fees in the payment. *Id.* ¶¶ 17-19. Relevant—indeed, dispositive—to the appropriate adjudication of this matter, any dispute between the proposed class representative and Citizens arising from the May 8, 2021 loss *never* proceeded to litigation. *See generally id.* ¶¶ 12–20.

In its single count, seeking a declaratory judgment, the Complaint alleges “all putative Class Members have submitted property insurance claims to Citizens for payment under policies,” *id.* ¶ 33, and, after hiring counsel to investigate the claims and submit “the required statutory pre-suit notice,” *id.* ¶¶ 34–35, “Citizens paid the claims but refused to pay any amount of attorney fees.” *Id.* ¶ 36. The proposed class representative and the putative class members thus contend that they are “in doubt as to [their] rights under Florida Statute 627.70152.” *Id.* ¶ 39.

II. Argument

A. Legal Standard

“The sufficiency of a complaint is a matter of law ... [and] [i]n reviewing a motion to dismiss the [] court’s gaze is limited to the four corners of the complaint.” *Rehabil. Ctr. of Hollywood Hills, LLC v. Fla. Power & Light Co.*, 299 So. 3d 16, 18 (Fla. 4th DCA 2020). If, “under the facts as alleged in the complaint,” the defendant, as a matter of law, “owed no duty,” dismissal of the action is appropriate. *Id.* at 23 (affirming dismissal with prejudice).

B. Chapter 2021-77, Laws of Florida

The Legislature passed Senate Bill 76, a comprehensive insurance bill during the 2021 legislative session, *see generally* Ch. 2021-77, Laws of Fla., creating, among other things, section 627.70152, Florida Statutes, *id.* § 12. In particular, two subsections in section 627.70152 are relevant in this case. First, subsection (1) states as follows:

(1) APPLICATION.—This section applies exclusively **to all suits** not brought by an assignee arising under a residential or commercial property insurance policy, including a residential or commercial property insurance policy issued by an eligible surplus lines insurer; (emphasis added)

and subsection (8), which states:

(8) ATTORNEY FEES.—

(a) **In a suit** arising under a residential or commercial property insurance policy not brought by an assignee, the amount of reasonable attorney fees and costs under s. 626.9373(1) or s. 627.428(1) shall be calculated and awarded as follows:

1. If the difference between the amount obtained by the claimant and the presuit settlement offer, excluding reasonable attorney fees and costs, is less than 20 percent of the disputed amount, each party pays its own attorney fees and costs and a claimant may not be awarded attorney fees under s. 626.9373(1) or s. 627.428(1).

2. If the difference between the amount obtained by the claimant and the presuit settlement offer, excluding reasonable attorney fees and costs, is at least 20 percent but less than 50 percent of the disputed amount, the insurer pays the claimant's attorney fees and costs under s. 626.9373(1) or s. 627.428(1) equal to the percentage of the disputed amount obtained times the total attorney fees and costs.

3. If the difference between the amount obtained by the claimant and the presuit settlement offer, excluding reasonable attorney fees and costs, is at least 50 percent of the disputed amount, the insurer pays the claimant's full attorney fees and costs under s. 626.9373(1) or s. 627.428(1). (emphasis added)

Subsection (8) effectively provides two independent requirements that an insured must satisfy before seeking her or his attorneys' fees from Citizens or any other insurer in Florida. First, the insured must file and prevail in a lawsuit regarding the unpaid policy proceeds. Even in the event

of such a successful suit, attorneys' fees will still be unavailable to the insured absent a further showing, namely a comparison between the amount obtained by the insured through the successful prosecution of a lawsuit and the insurer's presuit settlement offer. *Id.* § 8. It is these two subsections of section 627.70152 that, on their face, require the summary dismissal of the declaratory judgment complaint.

C. The plain language of section 627.70152 compels the dismissal of this declaratory judgment complaint

“The ‘polestar’ of statutory interpretation is legislative intent; when a statute’s language is clear and unambiguous, the actual plain language of the statute represents the legislative intent.” *Fla. Thoroughbred Breeders’ Ass’n v. Calder Race Course, Inc.*, 283 So. 3d 843, 845–46 (Fla. 1st DCA 2019); *see also Rollins v. Pizzarelli*, 761 So. 2d 294, 299 (Fla. 2000) (“An interpretation of a statutory term cannot be based on this Court’s own view of the best policy.”). Here, the plain language of section 627.70152 is clear and unambiguous: Attorneys’ fees are recoverable only following the filing of an actual *lawsuit* adjudicated in a court of law and resolved on the merits in favor of the insured.

First, consider the language in subsection (1): “This section applies exclusively to **all suits** not brought by an assignee arising under a residential or commercial property insurance policy, including a residential or commercial property insurance policy issued by an eligible surplus lines insurer” § 627.70152(1), Fla. Stat. (emphasis added). Next, consider subsection (8): “**In a suit** under a residential or commercial property policy” *Id.* § 627.70152(8) (emphasis added). The word “suit” is neither unclear nor ambiguous. Under a basic, commonsense understanding of the word, a “suit” is “[a]ny **proceeding** by a party or parties against another **in a court of law**.” *Suit*, Black’s Law Dictionary (11th ed. 2019) (emphasis added); *see also Florida Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452, 460 (Fla.

1st DCA 2017) (“To discern legislative intent, a court must first look to the plain and obvious meaning of the statute’s text, which may be discerned from a dictionary.”).

The proposed class representative had not filed suit when Citizens offered a settlement to her. Citizens offered a settlement, not only outside of a court of law, but entirely outside of litigation ever being commenced. The allegations in the complaint plainly state this. She—and allegedly all other putative class members—submitted insurance claims to Citizens for payment under the policies, provided “the required statutory pre-suit notice,” and as alleged in the Complaint, Citizens “**paid the claims** but refused to pay any amount of attorney fees.” Compl. ¶¶ 33–39 (emphasis added). Thus, the Complaint expressly alleges that the claims of the proposed class representative and all other putative class members were settled without the need for litigation.

Further, the attorney fee provision of subsection (8) references two other sections of the Florida Statutes—626.9373(1) and 627.428(1)—as the substantive bases for a court to consider any such attorneys’ fees claim by an insured. *See* § 627.70152(8), Fla. Stat. Regardless of which of these two sections apply, both sections 626.9373(1) and 627.428(1) mandate that the dispute involved an actual lawsuit in a court of law, as is made clear by the express requirement of a “judgment.” *See* § 626.9373(1), Fla. Stat. (“**Upon the rendition of a judgment or decree by any court of this state** against a surplus lines insurer in favor of any named or omnibus insured or the named beneficiary” (emphasis added)); *id.* § 627.428(1) (“**Upon the rendition of a judgment or decree by any of the courts of this state** against an insurer and in favor of any named or omnibus insured or the named beneficiary” (emphasis added)). It is axiomatic that a party cannot obtain a judgment without a court. *See Judgment*, Black’s Law Dictionary (11th ed. 2019) (“A court’s final determination of the rights and obligations of the parties in a case.”).

Stated simply, a plaintiff cannot obtain a judgment without first filing (and prevailing in) a lawsuit.² See, e.g., *S. Fla. Pain & Rehabil. of West Dade v. Infinity Auto Ins. Co.*, 318 So. 3d 6, 7- 10 (Fla. 4th DCA 2021) (affirming denial of fees under section 627.428 where insurer had timely paid PIP benefits prior to the lawsuit’s filing, noting “[i]f the Legislature has intended for attorney’s fees to be otherwise recoverable under the statute, it would have said so.”); see also *Fla. Life Ins. Co. v. Fickes*, 613 So. 2d 501, 502-04 (Fla. 5th DCA 1993) (reversing an award of fees to the insured where the insurer had paid the policy proceeds prior to the lawsuit’s filing):

If attorney’s fees were assessable in all cases without regard to whether or not a lawsuit was filed, then the stated intent or purpose of the statute – to prevent litigation – might well be defeated. An insurance company would have no incentive to settle a claim quickly and out of court if it faced an award of attorney’s fees in any case. We must conclude that attorneys’ fees under section 627.428 cannot be awarded where no suit is filed prior to payment of the full amount of the proceeds due under the insurance policy.

Further demonstrating the Complaint’s fatally flawed nature is the principle that “[a]ttorney’s fees cannot be awarded as a matter of equity. The fundamental rule in Florida is that attorneys’ fees are in derogation of the common law and will only be granted pursuant to a contractual agreement or statutory authority.” *Bauer v. DILIB, Inc.*, 16 So. 3d 318, 319-20 (Fla. 4th DCA 2009) (internal citations omitted); see also *Fla. Hurricane Prot. & Awning, Inc. v. Pastina*, 43 So. 3d 893, 894-96 (Fla. 4th DCA 2010) (granting petition for certiorari and reversing trial court’s award of fees to homeowner where there was no basis for fees under

² Even assuming *arguendo* that the proposed class representative was somehow entitled to seek attorneys’ fees under section 627.70152 without ever having filed suit, applying the statutory formula in subsection (8) would still result in the denial of any fees to her. This is because the formula involves a comparison between the “amount obtained” in a lawsuit and the “presuit settlement offer.” See § 627.70152(8)(a)1.–3. Since both figures are one and the same here, there is no amount in dispute and accordingly “each party pays its own attorney fees and costs and [the insured] may not be awarded attorney fees ...” § 627.70152(8)(a)(1).

reciprocity statute, noting “[t]o rule otherwise would be tantamount to rewriting the contract between the parties. This we will not do.”). Moreover, “[a]ny statute allowing an award of fees will be strictly construed.” *Consolid. Ins. Servs. v. Freeman*, 848 So. 2d 444, 447 (Fla. 4th DCA 2003). Given both of these well-established principles, a court cannot create a provision allowing an insured to seek attorneys’ fees without having ever filed suit, especially where, as here, the statutory language is plain. *See Bauer*, 16 So. 3d at 322 (“If the Legislature also intended to obligate third parties to pay attorney’s fees ... it was up to the Legislature to say so.”).

III. Conclusion

Citizens respectfully requests that this declaratory judgment complaint be dismissed due to its failure to state a cause of action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this document was filed with the Florida Courts E-Filing Portal on February 28, 2022, which will provide electronic service to all counsel of record.

/s/ Jason Gonzalez

Attorney